Nos. 58-59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

A. L. MECHLING BARGE LINES INC., ET AL.,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

BOARD OF TRADE OF CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS.

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Introduction—The briefs filed herein on behalf of the Interstate Commerce Commission and the New York Central Railroad Company (the "Commission" and the "NYC," respectively) have largely concentrated on the contention that the Commission need not consider viola-

tions of sections of the Interstate Commerce Act by rates in a proceeding under Section 4 of the Act in which the Commission authorizes such rates to be charged by applicant carriers. Here they have attempted a rationalization not attempted by the Commission, *viz.*, that the fact that Chicago is not on many of the direct routes *from Kankakee* to the east somehow should change the Commission's admitted policy of considering in fourth section proceedings all allegations and evidence of illegality of the rates under other sections of the Act. To a certain extent these parties then retreat from that position and attempt to introduce "findings" in their briefs *on those issues under other sections* which they wish had been, but were not, made by the Commission in its order.

Their defense on the non-compensatory 5½¢ rate rests almost entirely on the Solicitor-General's statement at page 31 of his brief of his agreement with the Commission in construing the proviso in Section 4 requiring that *any* charge to or *from* the more distant point be compensatory.[1] They give no citation of authority nor any refer-

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[1] The NYC (NYC Br.,p.26) urges that the Commission had not found that the NYC's out-of-pocket costs into Kankakee were 8.56¢ per cewt. on the average 55-ton load hauled for the weighted average distance of 38.3 miles. The Commission's finding at R.25 is categorical and without reservation:

> "On the average 55 ton load, the out-of-pocket costs of the New York Central and the eastern district railroads are 8.56 and 8.57 cents per 100 pounds, respectively, for the weighted average distance of 38.3 miles."

Thus, the Commission found that the NYC's out-of-pocket costs were an amount exceeding the 5-½¢ rate.

This finding, and the finding on fully-distributed costs (R.26), are a complete answer to the attempt of NYC's counsel (Br. 17) and of McNabb Grain Company's counsel (on pages 31-32 of his brief) to discredit an exhaustive

ence to the legislative history of the Transportation Act of 1920, of which the proviso of Section 4 was part. (Please see our "Reply to Interstate Commerce Commission's Motion To Affirm," pages 4-6, and our Plaintiffs-Appellants' Brief, pages 23-25.) Amazingly, the NYC has referred only to cases construing Section 4 as it stood *prior to the enactment of the proviso* in the Transportation Act of 1920 (NYC Br., p. 34).

Neither the NYC nor the Commission even attempts to show that the Commission made adequate findings on the effect of the 5½¢ rate on the net revenues of the applicant railroads *as a group.*[2] The argument of the NYC is cen-

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[1] (Continued)
cost study which was refined to take account of the way train handling of traffic on the Belt, the special services required in handling grain as compared to average traffic, the necessity to transport empty cars to the Belt stations because no grain cars ever were emptied there, the average length of haul, the high average loading of the cars, the additional increase in operating expenses and material prices in 1957, as shown in the railroads' rate increase requests, and the elimination of certain interchange costs (R.595-599).

Any further refinement lay entirely within the NYC's power, and it introduced no evidence of these costs, despite its burden of proving the rates compensatory.

[2] In considering what is a reasonably compensatory rate *under the fourth section*, the Commission points out in the leading case under the Act of 1920:

> "Moreover, the requirements of Section 15(a) may not be defeated or jeopardized by the action of particular rail carriers seeking to augment their own net earnings irrespective of the effect of rate changes adverse to the carriers of the country generally, or of a large territorial group. *Trunk Line and Ex-Lake Iron Ore Rates*, 69 I.C.C. 589, It clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle." *Transcontinental Cases of 1922*, 74 I.C.C. 48, 70-71 (1922).

tered entirely on the effect of the rate on the NYC alone and the use of the corn entirely at Kankakee, ignoring the other railroad applicants and the use of corn from the Belt for processing or consumption at places other than Kankakee, and the sale in the east of products milled at Kankakee (on the all-rail route) in competition with products milled at other points, such as Chicago (on the barge-rail route).

The brief for McNabb Grain Company is so replete with misstatements of the record (some apparent on their face and others apparent only from checking the brief's sometimes whimsical citations to the record) and with extraordinary *non sequiturs* drawn from its review of frequently non-existent "evidence" that a detailed listing of these errors would extend this reply beyond appropriate limits.[3] It does not offer any consideration of the points

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[3] As an example, it is stated in the brief (p. 36) that in arriving at the price paid the farmer "the amount deducted (by the river elevators for transportation, however, was not the actual shipping cost, *i.e.*, the barge charge of 4.625 cents per cwt., but the 'Illinois proportional', a 'paper' rail rate ranging from 16-½ to 23 cents." No citation to the record appears. The statement is completely unsupported, and untrue. An earlier ambiguous statement to like effect (which, as written, could apply to rail or to barge bids) appears at pages 8-9 of that brief, but the record citations given there refer only to *rail* bids, with the significant exception that at R.750 Witness Adam testifies that the basis of buying barge corn to arrive in Chicago is "CIF Chicago, cost, insurance, and freight delivered in barges." The plain sense of "freight delivered in barges" is that *the barge freight*, not a paper rail freight, charge, is considered.

Again on page 15 counsel state that most of the absorbed switching charges listed in Exhibit 14 were not paid to NYC subsidiaries. Exhibit 14 shows that of the $5,883.62 absorbed by the NYC on cars shipped to General Foods at Kankakee from Chicago, $3,112.35 was for switching in which its subsidiaries participated and $2,771.27 was for switching in which they did not. The McNabb brief com-

of law at issue here beyond that given in the briefs of the Commission and the NYC.

Because of the new attempt at rationalization by the direct route relief argument which has been introduced into the discussion of the validity of the rates under other sections of the Act, we will consider first this question.

I. THE COMMISSION FAILED TO MAKE THE REQUIRED FINDINGS REGARDING THE VALIDITY OF THE RATE UNDER OTHER SECTIONS OF THE INTERSTATE COMMERCE ACT.

A. In Authorizing These Rates the Commission Was Required to Pass On Their Validity Under Other Sections of the Act Insofar as the Protests and Evidence Had Presented Questions Of Such Validity.

The Commission's position appears to be that it does not grant fourth section relief "where the rates proposed to be established and maintained under such an order, result in violations of other sections of the Act" (I.C.C. Br. p. 25), but that not "every allegation of rate unlawfulness, no matter how remote, is to be disposed of in a fourth section proceeding" (*Id.* p. 26). The Commission does not restate this position in dealing with the question

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[3] (Continued)
pletely ignores the NYC's generally higher switching absorptions when its own subsidiaries are involved as shown in the exhibit.

The brief also urges on page 15 that corn going to Indianapolis from Chicago must go through Kankakee. There are, of course, more direct rail routes of other applicant railroads from Chicago to Indianapolis than the NYC's route through Kankakee but, as in the discussion of the NYC's route from Chicago to Kankakee, the more direct routes of other applicants are ignored by appellees. (Cf. Note 2, *supra*). Other points, such as Toledo, also use the Kankakee Belt corn, displacing ex-barge corn from Chicago, and obviously Kankakee would not be the normal route for movements *from Chicago* to points such as these.

of discrimination against the City of Chicago, for not even the Commission could urge that these allegations of discrimination were "remote." Instead the Commission here has misstated appellants' position as requiring every fourth section proceeding to "be converted into a general rate investigation" (*Id.* p. 31) when manifestly appellants ask only consideration of points raised in duly filed protests. In footnote 22, the Commission states its position to be that:

> "There was no occasion to consolidate [*sic*] the general rate issues raised by the appellants Board of Trade and Mechling because they never did file a formal complaint under Section 13 with the Commission" (*Ibid.*).

For "consolidate" read "decide," and the Commission's position in this case is stated.

A similar position was taken on pages 32-34 with respect to the materiality of the evidence on these points, most of which had been introduced and received without any objection to its materiality.

On page 25 the Commission acknowledges its long-held rule announced in numerous decisions[4] and reported to Congress in its Annual Report of 1920 (34 I.C.C. Ann. Rep. 47) as the rule it follows in fourth section cases. But on page 31 it restricts its rule in a fashion never even hinted until *The Seatrain Lines* decision[5] was handed down ten months after this case had been heard.

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[4] See cases cited at Plaintiffs-Appellants' Brief at page 34, in Appendix B of the Board of Trade's Brief, and in footnote 5 of the Brief for the United States.

[5] *Seatrain Lines, Inc.* v. *U.S.*, 168 F. Supp. 819 (S.D. N.Y. 1958)

The Commission and the NYC urge that the orders granting, in the time-honored language of such orders, temporary fourth section relief and ordering a hearing all gave notice that formal complaints could be filed to obtain an investigation. They do not explain, however, why appellants would be warned that further complaint was necessary to obtain a hearing when the Commission had already ordered a hearing in response to appellants' protests, and the Commission's announced rule in fourth section proceedings was to deny fourth section relief if the proposed rates violated other sections of the Act as alleged in appellants' protests and supported by evidence at the hearing.

The NYC seeks to ignore these protests as framing issues in the proceeding, saying that only the application was the basis for the Commission hearing (NYC Br. pp. 35-36, 45). Such a position comports neither with the facts, the Commission's long-standing practice, good legal procedure, justice, nor the law. Factually, it can hardly be doubted that the Commission, willing to grant temporary fourth section relief without a hearing and without findings despite the protests, would have felt it unnecessary to hold a hearing on granting permanent relief had the protests not been filed raising various legal and factual issues. Procedurally, it makes no sense for a body created to deal expeditiously with substantive problems before it to adopt a new doctrine of administrative "forms of action," even more rigidly technical and compartmentalized than England's courts ever knew. In justice, even if the Commission were to adopt such a narrow procedural position for the future, it should not do so here, having given no prior warning to these appellants who relied on the many earlier pronouncements of the Com-

mission.[6] In law, it finds no justification as the Commission has frequently said in accordance with the statements of this Court, for the Commission is required by Section 12[7] of the Act to prevent all violations of the Act, no matter in what manner such violations come to its attention, provided the alleged violator has opportunity for a hearing. The Commission's action authorized these rates, after a hearing. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." *The Chicago Junction Case*, 264 U.S. 258, 265 (1924). The National Transportation Policy[8] requires all sections of the Act (including Section 4) to be construed in accordance with its terms and objectives. Is it the intent of Congress that the Commission, after such a hearing, may authorize charging a rate which it is obliged to prohibit? The Commission has said many times that this could not be the intent of Congress. See Note 4, *supra*. Furthermore, as will be seen, reasonable resolution of the questions under Section 4 required decisions on the questions under Section 3.

Finally, both the Commission and NYC appear to urge that because Chicago is not on the direct route from

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[6] The purported reliance of the NYC (NYC Br. p. 47) on restriction of the hearing is not apparent from its actions in the proceeding. In its Reply it answered on substantive, not procedural, grounds, the issues raised in the protests under other sections of the Act (R. 256, 266-269, 273-274, 275-276). Similarly, except with respect to the evidence of violations of Section 3(4) and of Mechling's costs, *no objection was made to the relevance of any of the evidence introduced on these points.*

[7] 49 U.S.C. § 12, 72 Stat. 909

[8] 49 U.S.C., Note preceding Sec. 1, 54 Stat. 898

Kankakee to eastern destinations, and "further" fourth section authorization by the Commission no longer is required for circuitous routes after the Commission authorizes departure rates over the direct route, the Commission was thereby excused from considering allegations of discrimination by Chicago and by plaintiffs-appellants. It is not only intermediate points on the relief routes that are permitted to *protest grants of fourth section relief*. Interests other than the intermediate towns are proper, even though not necessary, parties in fourth section proceedings. *Confectionery to Jacksonville, Fla.*, 272 I.C.C. 240, 241 (1948); *Confectionery to New Orleans, La.*, 273 I.C.C. 264, 265 (1948).

B. The Commission Made no Adequate Findings On the Objections To the Rates Under Sections 1(5), 3(1), 3(4) and the National Transportation Policy.

The Commission made no findings of any kind with respect to the justness and reasonableness of the non-compensatory 5½¢ rate under Section 1(5), ostensibly because it was a proportional rate. Separately-published inbound proportional rates, which this 5½¢ rate is, must comply with the requirements of the Act. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U.S. 768 (1929).

The Commission did not refer to the violation of Section 3(4), refusing even to give a reason for ignoring

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* 49 U.S.C. 4. It is the diversion of corn from northeastern Illinois to the east from the direct barge-rail route *via* Chicago, to the *all-rail route via Kankakee* under the departure rate authorized for *that* rail route, that created the Section 3(1) discrimination against Chicago. Moreover, the application specifically asked authority for the departure rate *via* direct *and* circuitous routes (R. 147-149). As to the greatly diminished movement via Chicago under the departure rates, the protestants pointed to the violation of Section 3(4).

the contention of plaintiffs-appellants despite the evidence that applicants charge 13¢ per cwt. more to haul *ex-barge* corn from Chicago to the east than they charge for the same haul if the corn is brought from Kankakee to Chicago by the NYC. (See plaintiffs-appellants' brief, pp. 31, 32) Yet inquiry into such discrimination, particularly in view of the NYC's establishment of Kankakee as an independent gateway competitive with ex-barge corn at Chicago, is required by the decisions under Section 3(4) culminating in *Arrow Transportation Company* v. *United States*, 176 F. Supp. 411 (N.D. Ala., 1959), *aff'm'd on motion sub nom. State Corporation Commission of Kansas* v. *Arrow Transportation Company*, 361 U.S. 353 (1960).

The Commission dismissed the charges of discrimination made by the Board of Trade with the pronouncement that they did not deal "directly" with the "fourth section" principles involved in the case (R. 26-27). Its only expression with respect to the milling-in-transit limitation was that the NYC had indicated a willingness to remove it. There is no reason for that expression other than that the Commission was assuming it would be removed (being discriminatory). The Commission then remarked that the proposed rates were effective over Chicago and the routes (not rates) over Kankakee were the same as they had been for many years (even though more limited in scope than those which would be available if the inbound rate break was at Chicago) and concluded that there was no indication of undue damage to Chicago (R. 27).[10] No consideration was given to the NYC's acknowledge intention to prevent Belt corn from going to Chicago and its

[10] The District Court did not review that conclusion or consider whether there were either subsidiary findings, or evidence, to support it, but dismissed it as "surplusage." (R. 77).

construction of the rate tariff to further that end (R. 320-321, 339-340, 768-769, 790-791), nor to the increase of Belt corn shipments, most of which by-passed Chicago after the departure rates were made effective (Ex. 49, R. 803). No findings made were adequate to deal with any one of the charges of discrimination made by the Board of Trade, to say nothing of all of them.

Particularly to be considered was the creation of Kankakee as a separate rate break point with a rate not made usable for Chicago, the principal corn market of the world, because of the limited list of products to which the rate was made applicable, the restricted routing from Kankakee and the milling-in-transit limitations. The application for this departure rate was for a rate that made Kankakee a new gateway, with discriminatory advantage over Chicago, and raised substantive questions on which the Commission refused to pass. *Wichita Board of Trade* v. *A. & S. Ry. Co.*, 29 I.C.C. 376, 377, 380 (1914); *Sioux City Terminal Elevator Co.* v. *C.M. & St.P.Ry.Co.*, 23 I.C.C. 98, 27 I.C.C. 457, 461-463 (1913); *Toledo Produce Exchange* v. *N.Y.C.R.R.Co.*, 50 I.C.C. 515, 520-521 (1918); *Iowa Railroad Commissioners* v. *Director General*, 63 I.C.C. 405, 408-409 (1921); *Helena Traffic Bureau* v. *M.P.R.R.Co.*, 89 I.C.C. 405, 410 (1924); *Mississippi R.R. Comm'n* v. *A. & V. Ry. Co.*, 93 I.C.C. 435, 444-445 (1924).

The rail grain rate structure from midwestern points to the east had been constructed for fifty years on the basis of area groupings graduated according to distance (see Exs. 57, 61, R. 813-816) and designed generally to equalize the opportunity of movement from local origins to any of various midwestern grain markets and thence to the east. *In the Matter of the Applications Of Carriers in Official, Southern and Western Territories For Authority to Increase Rates*, 58 I.C.C. 220, 252-253 (1920). Rates

from Illinois to the east had been constructed as a combination of proportional or local gathering rates to Chicago as the principal corn market and the Chicago proportional to the east (Ex. 58, R. 813) and applied equally via all the Illinois markets including Kankakee. The development of this equalized grain rate structure with equal opportunity of movement through the many processing centers gave rise to the reciprocal routing from Kankakee via Chicago and from Chicago via Kankakee to the east for grain and grain products on equal proportional rates. *This reciprocity of opportunity of movement is the sole source of the NYC's contention that by disrupting the reciprocity with a special rate applicable via Kankakee and not usable via Chicago it can save the cost of transporting corn between Chicago and Kankakee, and thereby make the Belt rate compensatory in the sense of increasing the railroad applicants' net revenues beyond those earned from the reshipping rate which they receive on ex-barge as well as ex-Belt corn. Thus the decision as to whether or not the Belt rate is compensatory under Section 4 is inextricably intertwined with the disruption of the traditional equal rate treatment of which the Board of Trade complains under Section 3.* A rational decision under Section 4 cannot be made without the decision under Section 3 which the Commission refused to make.

Similarly the reshipping rate from Kankakee and Chicago were designed to cover the cost of the widely circuitous movements allowed under them (R. 378-379) and illustrated in Exhibit 61. If rates are to be constructed via Kankakee so as to restrict this circuitous movement in order to subsidize a non-compensatory inbound rate, in all fairness to the applicants' connecting carriers at Chicago and in order to comply with Section 3(4), a similar restriction in rout-

ing should be offered with a specially reduced reshipping rate from Chicago to compensate for the subsidization of the inbound rate to Kankakee.

These questions are of course substantive questions not passed upon by the Commission and not ripe for decision by this Court. They only illustrate the reason why the Commission could not reasonably restrict the issues in this proceeding to those arising solely under Section 4 and demonstrate the inadequacy of the offhand remarks of the Commission to decide the important questions under Section 3.

In their briefs, counsel for the Commission and the NYC attempt to supply findings, conclusions and arguments not made by the Commission which, in their opinion might justify ignoring the Board of Trade's (and Plaintiffs-Appellants) charges of discrimination (I.C.C. Br. pp. 34-37; NYC Br. pp. 27-28). There is, of course, much that could be said to demonstrate the substantive errors they involve but it is enough to note that the Commission made no such "findings", expressed no such "conclusions," and therefore attempted no such rationalization. No one can at this late date do the work which the Commission is required to do. The Commission's Report must show on its face the findings and analysis which form the basis for its decision on the material issues in the proceeding. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-168 (1962); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 510-511 (1935); Sec. 8(10) of the Administrative Procedure Act, 5 U.S.C. §1007 (b). This report manifestly does not show a substantive basis (apart from the procedural objection that the protestants did not file a complaint under Section 13) for denying relief against the violations of Section 3.

The Commission further made no findings with respect to relevant standards under the National Transportation Policy other than its finding that Mechling's weighted average fully distributed costs for service to Chicago were 4.4¢ per cwt., compared to the NYC's average fully distributed costs for the haul from Belt station to Kankakee of 13.57¢ to 14.33¢ per cwt. (R. 26).

Again the Commission's counsel tries to supply findings by comparing Mechling's *average cost* of 4.4¢ per cwt. for hauls from the *six* most competitive ports with its *average rates* from the *ten* ports used for comparison by the NYC in its Exhibit 10 (I.C.C. Br. p. 46). This comparison of unlike costs and rates is highly unfair and misleading.[11] By reason of its intermediate location among the six ports used in Mechling's cost study and its origination of much greater traffic than any of the other ports, Morris is the port nearest to the average (See Ex. 35, R. 640). The barge *rate* from Morris *after* the increase in December 1957, referred to by the Commission's counsel, was 4.4¢ per cwt. (R. 618), or exactly what the Commission found Mechling's average *cost* to be. Thus the rate increase in December 1957 was necessary to enable Mechling to recover its fully distributed costs on the traffic. It was followed, as the examiner found, by increasing diversion of traffic to the Belt; and this diversion would be so enhanced, if the milling-in-transit requirement were removed to mitigate the discrimination against Chicago, as to spell the elimination of this barge transportation (R. 50). The Commission conspicuously refrained from saying the contrary.

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[11] Mechling had no warning that Exhibit 10 would include the more distant (and therefore higher-rated) downstream ports of Henry, Hennepin and Lacon, since those ports were not referred to in the application for relief or the subsequent litigation for a temporary injunction. It prepared its cost exhibit with reference to the six ports named in the application and the litigation.

The Commission made no findings on this point, and has in no wise satisfied the requirements of the *New Haven* case.[12]

Nor does the contention of the NYC that it has the short route *via* Kankakee satisfy the requirements of *New Haven*, since it depends on the false assumption that all *ex-barge* corn at Chicago displaced in eastern markets by the Kankakee Belt corn, would have to go over the NYC's circuitous route down to Kankakee in order to get to its eastern destination; and on the further assumption that the NYC can not only reduce, but wholly and permanently prevent, any movement of corn from the Kankakee Belt through Chicago[13] (NYC Br. pp. 50-52). (The latter assumption aggravates the already grave discrimination against Chicago.)

The validity of this latter assumption depends upon the perpetuation of applicants' unlawful preference of Kankakee over Chicago, and makes even more obviously necessary the determination of all the legal questions with respect to these rates in one proceeding. Only if applicants can avoid the necessity in this proceeding of facing the discrimination against Chicago can they make specious arguments about savings effected by avoiding the circuitous haul from Chicago to Kankakee, *without having to answer for the cost of added haul from Kankakee to Chicago.* By taking the matter piece-meal they argue that the rate is compensatory when the corn goes directly east

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[12] *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744 (1963) holds that the rails cannot go below their *fully distributed* costs if that compels the competing water carriers to go below their own *fully distributed* costs to compete. The Commission has made no findings whatever on this point. See pp. 32-33 of plaintiffs-appellants' brief.

[13] In making this argument the NYC freely admits that the Kankakee Belt corn displaces ex-barge corn via Chicago that would have gone east (NYC Br. p. 50).

via Kankakee—which discriminates against Chicago. If on *that* basis the rate were held compensatory, and the rails then should make it usable on the circuitous route via Kankakee *and* Chicago by removing the restriction against corn milled in transit, they would argue that the rate had been held compensatory and that discrimination against Chicago had been removed! That would require another costly proceeding, duplicating averments made and evidence received on this record, for in the Commission's report there is no pretense that the rate is compensatory when the cost of movement from Kankakee to Chicago is considered.

II. THE 5½¢ RATE IS NOT COMPENSATORY AS IT IS REQUIRED TO BE BY SECTION 4.

Only the Solicitor-General and the NYC have seen fit to mention either the language of Section 4 or the legislative history of the Transportation Act of 1920 to construe the meaning of the proviso in Section 4 prohibiting Commission authorization "of any charge to or from the more distant point that is not reasonably compensatory for the service performed".[14] Their discussion is limited to con-

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[14] At pages 16-17 of its brief the Commission may have tried, by referring to "charges to the more distant points," to avoid the force of plaintiffs-appellants' contention that this proviso applies in this case to the 5-½¢ origin rate, because the origins here are the more distant points, the destinations being common for hauls from both the Belt stations and the intermediate stations in Indiana. The application made clear that relief was sought for departures at the origins via both direct and indirect routes (the application having been submitted before the 1957 amendment to Section 4 was enacted):

> "Additional relief is therefore necessary at origin; thus this application." (R. 144).

The proviso prohibits *any* non-compensatory charge *from* the more distant point.

sideration of one paragraph of Senator Townsend's debate and citation (by the NYC) of three Commission decisions rendered *before enactment of the proviso.*

In addition the NYC characterizes as "strained argument" plaintiffs-appellants' contention that when the new and different words "any charge to or *from* the more distant point" were used by Congress in 1920 in the newly-enacted proviso, it intended to, and did, have a new and different meaning from that of the old and different words "any greater compensation in the aggregate" enacted many years earlier in the first sentence of Section 4. Yet one of the most fundamental principles of statutory construction is that the use of different words having different meanings in separately enacted statutes must be construed as intending the differences in meaning which the words have in normal usage, at least in the absence of legislative history convincingly demonstrating the contrary. *Brewster* v. *Gage*, 280 U.S. 327, 337 (1930); *Crawford* v. *Burke*, 195 U.S. 176, 189-190 (1904); *Pirie* v. *Chicago Title & Trust Company*, 182 U.S. 438, 448 (1901).

No one has shown any history of the enactment of the Transportation Act of 1920 which would indicate any purpose on the part of Congress to restrict the broad meaning of "*any* charge to or from the more distant point" to the narrower meaning "charge . . . any greater compensation in the aggregate." On the contrary, the paragraph from Senator Townsend's debate cited by the Solicitor General,[15]

[15] "It has been wrong and is so now to fix the longer-haul rate so low that in itself it is not compensatory; that is, it does not yield its proper portion of the expense of operation of the railroad system. Then it stands to reason that *shorter routes paying the higher proportioned rate must have an additional burden placed on them.* That is wrong." (59 Cong. Rec. 740).

(even though stripped of its context showing how he deplored the maintenance of low rail rates designed to prevent development of any water competition on the rivers) shows clearly that he thought it wrong to maintain rates which were non-compensatory because they placed a burden on other traffic. It is not surprising therefore that in his next sentence he emphasized that the proviso he proposed would permit *no* rate to be fixed by the Commission which in itself is not compensatory.[16]

These statements, moreover, must be viewed in light of the general purpose of Congress in the Transportation Act of 1920, of which the proviso was a part, to enact substantial protection for water carriers, not theretofore found in the Act, against predatory rate practices of the railroads.[17] There can be no doubt that Congress intended absolutely[18] to outlaw "any" non-compensatory rail

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[16] "When the committee had the bill before it I offered an amendment to that provision, which was adopted, which states positively that no rate shall be fixed by the Commission which is not compensatory; . . ." (Ibid)

[17] See the Committee Reports as quoted and discussed at pages 23-24 of plaintiffs-appellants' opening brief. The Transportation Act of 1920, for its first time, forbade non-compensatory rail rates, for the reason, repeatedly stated in the Committee Reports, that thereby the railroads could first reduce the number of vessels in water transportation and then put the competitive rail rates back up again "to even higher costs" so that "the public was no better off and was, in fact, worse off than before." (loc. cit.)

[18] The outlawry is absolute even though shippers might derive a temporary advantage from reduction in the rates, as appellees insist shippers will in this case. Congress had had ample demonstration of how illusory and expensive such "advantage" proved in the long run and allowed no discretion on this point.

Incidentally, the Commission's hypothetical suggestion of an 8-½¢ advantage to farmers from the below-cost competi-

"charge", to or from any more distant and competitive point, designed to divert traffic from the water carriers. The care taken to protect water carriers in the subsequent Transportation Act of 1940, with its injunction to construe all sections of the Act in accordance with the National Transportation Policy, has been well set forth by this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947).

No purpose of either Senator Townsend or Congress can be served by permitting the establishment of non-compensatory competitive rate factors by so transparent a device as is attempted here.[19] Non-compensatory rail rates are cut-throat rates, and have had no defenders in Congress since

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[18] (Continued)

tive 5-½¢ rail charge, relied on by the Commission in its Motion to Dismiss or Affirm, is not supported by the record as pointed out in our answer to that motion, note 2.

In the same connection, counsel's suggestion that there were no competitive bids for the farmer's grain prior to the below cost rail rate ignores the obvious fact that elevators were in competition with each other for river shipment of corn. Again, there is no finding by the Commission of any absence of competition between river shipping elevators in the accumulation of corn for river shipment.

[19] Although the NYC still says the rates might have been filed as one-factor through rates, there is still no evidence in the record that it could have obtained the consent of its connecting carriers to do this. Had it been done, the separate segments might then have still been subjected to examination. Cf. *Arrow Transportation Company* v. *United States*, 176 F. Supp. 411 (N.D. Ala., 1959); *aff'm'd on motion*, 361 U.S. 353 (1960). Suffice it to say for now that one-factor rates were not filed, and there is no evidence they could have been.

1920. Why, then, ignore the plain meaning of the words of Congress to save a practice so consistently condemned?[20]

On still another basis the proposed through rates must be found non-compensatory. To be reasonably compensatory the proposed rates must be found to produce more net revenue for the participating carriers than they would realize without the rate. *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71 (1922); *Transcontinental Westbound Automobile Rates*, 209 I.C.C. 549, 559-561 (1934). It is agreed by the NYC (Br. p. 50) that the Belt corn attracted by the 5½¢ rate displaced ex-barge corn that would have gone

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[20] If, as the Commission supposed, when the Belt corn is nearly all going east directly from Kankakee (without expensive movement to Chicago) the revenue from the non-competitive eastern factor would subsidize the loss on the competitive inbound 5-½¢ factor, that would not cure the mischief against which the Transportation Act of 1920 was directed, for subsidy of competitive, below-cost charges with revenue from non-competitive business, is the classic device of strangling monopoly. In connection with the non-competitive eastbound factor, it will be borne in mind that:

> "A zone of reasonableness exists between maximum and minimum within which a carrier is ordinarily free to adjust its charges for itself" (*U.S. v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 506), a principle under which the maximum reasonable rate is ordinarily determined by "the well-known rule of 'what the traffic will bear'" (*Livestock-Western District Rates*, 176 I.C.C. 1, 82-83) in accordance with the theory "that the carrier should decide what, in view of all the circumstances, the articles could afford to pay and then charge neither more nor less—certainly not less, because then the profit would be lower than it otherwise would, and not more, because a higher charge would curtail the amount of the traffic and the revenue derived therefrom, or possibly destroy the shipper and lose all his freight." P. 15, *Comparison of Rail, Motor and Water Carrier Costs*, prepared by the Board of Investigation and Research of the Commission, S. Doc. No. 84, 79th Congress, 1st Session, dated September 20, 1944.

east from Chicago by rail.[21] Thus the applicant railroads would have received the reshipping rate to the east in any event. The only additional revenue they receive for the haul into Kankakee is the 5½¢ rate, and the 5½¢ is not sufficient to cover the out-of-pocket costs of the haul.

None of the appellees has sought to answer this point directly, other than by the spurious argument noted before that the expense of the NYC's circuitous route from Chicago to Kankakee is saved on all the corn purchased off the Belt. Again it must be noted that more direct routes from Chicago to points other than Kankakee via applicant carriers other than the NYC would normally be used by the ex-barge corn displaced by the Belt corn. Again it must be emphasized that should the unlawful discrimination against Chicago be halted, and Chicago be permitted to use the rate, the alleged saving would become a further loss, because the cost of movement from Kankakee to Chicago would be added to the loss already incurred on the haul to Kankakee. There is no way for the rate to meet the requirements of Sections 3 and 4 at the same time, and the order approving it must be vacated for it is inconceivable that Congress contemplated that the Commission should authorize rates that Congress condemned as unlawful discriminations. This Court holds that the Commission's duty is to administer the Act "as a whole." *American Trucking Association* v. *United States*, 355 U.S. 141, 152 (1957).

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[21] The New York Central's acknowledgment makes it unnecessary to discuss the fallacy of counsel for McNabb Grain Company on page 29 of his brief. There counsel compares the eastbound rail movement of corn only from Chicago with the *total* inbound barge movement (not just that from this area) during 1956, finding the barge movement larger, and concludes that the ex-barge corn at Chicago could not have gone primarily to the east as the witnesses testified it did. He ignores the rail movement from Chicago to the east of corn products milled from ex-barge corn.

III. THE 5½¢ RATE IS DESTRUCTIVE.

In discussing the level of the rate, the Commission and the NYC have contented themselves in their briefs with the recitation of the increased barge corn movement to Chicago in 1957 over 1956 and the usual litany on the limited power of the court to review the Commission's orders. No attempt was made to explain the logic of ignoring the many other factors contributing to the temporary 1957 increase while concluding that the increase showed no serious loss to the barge lines could result from the rate. Only counsel for McNabb doubted plaintiffs-appellants' recital of the evidence showing the certain prospect of substantial future increases in the diversion of corn from the barges to the Belt (Br. p. 52) and his doubt resulted only from overlooking the copious record citations to this evidence given in the last paragraph on page 17 in plaintiffs-appellants' Statement of the Case.

It is no accident that this evidence is not challenged on substantive grounds. In its Reply to Petitions the NYC had forecast that expansion of Belt elevator capacity would enable them to reduce the barge movement into Chicago to a minimum of about 20,000,000 bushels (R. 268). Examination of the Statistics of the Board of Trade of the City of Chicago, 1963,[22] shows that by 1963 the declining amount of corn received in Chicago via the Illinois Waterway had fallen to 16,054,000 bushels from in excess of 34,000,000 bushels in 1957. This sharp drop demonstrates graphically why even expert bodies must be compelled by reviewing courts to use logic in drawing conclusions from facts. *Public Service Commission of Utah* v. *United States*, 356 U. S. 421 (1958).

[22] Not yet published.

None of the Respondents attempts any defense (see our opening brief, pp. 38-39) of the Commission's theoretical adjustment (R. 17) of *actual* river and rail bids (bids made by people buying *from* country elevators (R. 655, 656)) as a rational basis for its conclusion that the below-cost rail rate was not destructive. This "adjustment" was made by eliminating from the calculation of the country elevator's bid (to the farmer) on corn to go *by river*, of the country elevator's markup (or "cost" as the report (R. 17) calls it). Such a deduction from the bid to the farmer is, however, common to bids *to the farmer* whether the corn is to go by river or by rail. (R. 743, 772, 824) The Commission's one-sided elimination of an item common to both river and rail transportation is particularly inexcusable, when the Commission makes no finding on the cogent and uncontradicted evidence that constrains the Commission's examiner, who heard it, to conclude that continuance of the below-cost rail rate involves a great and progressive diversion of traffic from the river to the rails and one that would be so increased (if the discrimination against Chicago were mitigated by removing the milling-in-transit restriction) as to portend, not just great diversion, but complete elimination of the barge transport of this traffic. (R. 50)

CONCLUSION.

The Commission has refused without prior warning to decide legal questions which could not reasonably be doubted to be in issue under the Commission's long-standing and frequently reiterated practice, issues that were made by the protests and the railroad replies to those

protests on which the Commission granted and held a hearing. The Commission refused to decide these questions for the sole reason that only by so refusing could it shut its eyes to illegalities of the rate it authorized, whose progressive injury to plaintiffs-appellants cannot yet be measured, but is already greater than the applicant railroads said they expected and intended. In authorizing the rate the Commission ignored the plain language of the statute under which it was required to act, and refused to follow its own stated understanding of the Transportation Act of 1920, that a group of rail carriers may not use fourth-section departure rates to divert traffic from water carriers merely to injure water carriers—without any showing or finding of reasonable expectation of increased net revenue for the rail carriers as a group.

Respectfully submitted,

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